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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/675,091	09/30/2003	Jean Beaupre	END5101.0515146	4756
26874	7590	05/18/2007		
FROST BROWN TODD, LLC			EXAMINER	
2200 PNC CENTER				POUS, NATALIE R
201 E. FIFTH STREET			ART UNIT	PAPER NUMBER
CINCINNATI, OH 45202			3731	
			NOTIFICATION DATE	DELIVERY MODE
			05/18/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

dbell@fbtlaw.com  
dfranklin@fbtlaw.com  
rgaunce@fbtlaw.com

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/675,091	BEAUPRE, JEAN
	Examiner Natalie Pous	Art Unit 3731

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 21 February 2007.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1 and 14-20 is/are pending in the application.
  - 4a) Of the above claim(s) 6-8 and 11-13 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1,14-20 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date: _____
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	5) <input type="checkbox"/> Notice of Informal Patent Application
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>7/5/05</u> .	6) <input type="checkbox"/> Other: _____

**DETAILED ACTION**

***Election/Restrictions***

Claims 6-8 and 11-13 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species; there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 2/21/07.

Applicant's election without traverse of species 1 in the reply filed on 2/21/07 is acknowledged.

***Response to Arguments***

Applicant's arguments with respect to claims 1-13 have been considered but based on the amendments to the claims, are moot in view of the new ground(s) of rejection.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 recites the limitations "the connecting member" and "the woven tube" in lines 7 and 15 respectively. There is insufficient antecedent basis for this limitation in the claim.

***Claim Rejections - 35 USC § 103***

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1 and 14-20, are rejected under 35 U.S.C. 103(a) as being unpatentable over Evard et al. (US 6616675) in view of Park et al. (US 2003/0120292).

Evard teaches an anastomosis device, comprising the following:

a first plurality of arcuate members (see figure below) arranged in a first position in a cylindrical crown shape; and a second plurality of arcuate members arranged in a first position in an inverted cylindrical crown shape (see figure below) and connected by the connecting member (D<sub>2</sub>) to a leg of an arcuate member of the first plurality (fig. 3');

wherein the legs of the arcuate members of the first plurality are attached to the respective arcuate member of the second plurality by a connecting member (D<sub>2</sub>).

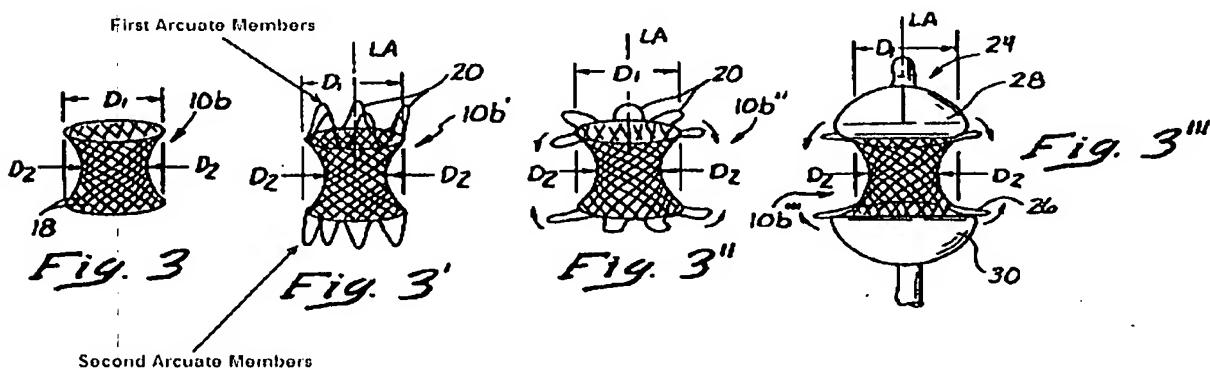
Wherein the legs of the arcuate members of the first plurality are attached to the respective arcuate member of the second plurality by a rigid connecting member (Column 2, proximate lines 63-65), a petal formed by the first arcuate member actuating

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generally in a plane with the respective attached arcuate members pivoting about a cylindrical midpoint of the anastomosis device (fig. 3''); and wherein the woven tube thus formed is operably configured to transform into a second position comprising a hollow rivet shape (fig. 3''') with each arcuate member outwardly deflected from a longitudinal axis of its respective cylindrical crown toward apposing arcuate members of the other cylindrical crown.

Wherein the connecting member comprises a band (D<sub>2</sub>) at a midpoint of the device connected to each arcuate member (fig. 3')

Wherein the arcuate members are formed of memory effect alloy wire (Column 2, proximate lines 37-38)



Evard fails to teach wherein each arcuate member has legs overlapping at least one adjacent arcuate member. Park teaches an anastomosis device wherein the legs of the arcuate members overlap in order for the device to cover more surface area of the vessel and thus create a watertight seal (paragraph 28). It would have been obvious to

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one of ordinary skill in the art at the time the invention was made to modify the device of Evard with overlapping arcuate members in order for the device to cover more surface area of the vessel and thus create a watertight seal.

Claims 14 and 16-20 are being treated as a product by process claims, in that the claims refer to the process of making the device and not to the final product created. As set forth in the MPEP 2113, "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior art was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted) (See MPEP §2113). Examiner will thus evaluate the product claims without giving much weight to the method of its manufacture.

Thus, in this case, claim 14 and 16-20 include limitations directed to the method of making the device and not the final product made. It appears the combination of Evard and Park would be the same and would perform equally well as that claimed; especially since both applicant's product and the prior art have the same final shape and structure and perform the same function of an anastomosis device.

### **Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Natalie Pous whose telephone number is (571) 272-

6140. The examiner can normally be reached on Monday-Friday 8:00am-5:30pm, off every 2nd Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anhtuan Nguyen can be reached on (571) 272-4963. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

NRP  
4/30/07

  
(JACKIE TAN-UYEN HO  
PRIMARY EXAMINER)

05/08/07